

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JULIO JULIETA,

Petitioner,

vs.

S. FRAUENHEIM, Warden.

Respondent.

Civil No. 16cv0987-BTM (BGS)

ORDER:

- (1) ADOPTING THE FINDINGS
AND CONCLUSIONS OF UNITED
STATES MAGISTRATE JUDGE;**
- (2) GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS PETITION FOR A WRIT
OF HABEAS CORPUS;**
- (3) DISMISSING CLAIMS 1-3
FROM PETITION; and**
- (4) DIRECTING RESPONDENT
TO ANSWER PETITION**

Julio Julieta (hereinafter “Petitioner”), is a California prisoner proceeding pro se and in forma pauperis with a Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (ECF No. 1.) Petitioner was convicted on March 15, 2013, of aggravated kidnapping for extortion, assault with a firearm, torture, two counts of forcible rape, and two counts of forcible sodomy, along with firearm use and bodily injury sentencing enhancement findings. (Id. at 1, 7.) Petitioner was sentenced to life in prison on the kidnapping count, plus two consecutive terms of 25 years-to-life on the rape counts, with

1 the sentences on the remaining counts stayed. (Clerk's Tr. at 743-45; ECF No. 9-4 at
 2 235-37.) He received an additional 40 years imprisonment for the sentencing
 3 enhancement findings, consisting of 10 years for the firearm use enhancement on the
 4 kidnapping count, and 30 years for the firearm use and bodily injury enhancements on
 5 the two rape counts, for a total term of 90 years-to-life. (*Id.*) On January 12, 2015, the
 6 state appellate court reversed the kidnapping conviction on direct appeal due to
 7 insufficient evidence, affirmed in all other respects, and remanded with instructions to
 8 enter a judgment of acquittal on the kidnapping charge and resentence Petitioner,
 9 including vacating the 10-year firearm use enhancement on the kidnapping count. (ECF
 10 No. 9-10.) On June 15, 2015, the trial court acquitted Petitioner of the kidnapping
 11 charge and resentenced him to 80 years-to-life. (ECF No. 9-14 at 4-5.) The sentence
 12 consisted of the same two consecutive terms of 25 years-to-life on the two rape
 13 convictions, plus the same 30 years on the sentence enhancement allegations for those
 14 two counts, with the sentences on all other counts stayed. (*Id.*)

15 Petitioner alleges here that his federal Constitutional rights were violated because
 16 insufficient evidence supports the kidnapping conviction (Claim 1), the trial court failed
 17 to instruct the jury on false imprisonment as a lesser included offense of kidnapping
 18 (Claim 2), the jury was improperly instructed on the elements of kidnapping (Claim 3),
 19 the trial court erred in imposing consecutive 25 years-to-life sentences on the two rape
 20 counts (Claim 4), by the cumulative effect of the errors (Claim 5), and because the
 21 defense was denied access to the victim's sealed immigration file which the trial and
 22 appellate courts reviewed in camera (Claim 6). (ECF No. 1 at 11-43.¹)

23 Respondent has filed a Motion to Dismiss, contending that Claims 1-3 are moot
 24 due to the reversal on appeal and subsequent acquittal of the kidnapping count, and that
 25 Claims 4-6 are not cognizable on federal habeas. (ECF No. 9.) Petitioner has filed a
 26 Traverse arguing that Claims 4-6 are cognizable on federal habeas, and that Claims 1-3

27
 28 ¹ The Court refers to the page numbers assigned by the Court's Electronic Case Filing ("ECF")
 system when citing to the Petition.

1 are not moot because if he had received complete relief from the state court on his
 2 kidnapping charge his sentence would have been reduced by 40 years rather than merely
 3 10 years. (ECF No. 11.)

4 United States Magistrate Judge Bernard G. Skomal has filed a Report and
 5 Recommendation (“R&R”) which recommends the Motion to Dismiss be granted as to
 6 Claims 1-3 and denied as to Claims 4-6. (ECF No. 12.) The Magistrate Judge found that
 7 Claims 1-3 are not cognizable on federal habeas because they challenge a conviction
 8 which has been invalidated, and that Petitioner is incorrect in his assertion that his new
 9 sentence did not reflect complete relief from that conviction. (R&R at 3-5.) The
 10 Magistrate Judge found that Claims 4-6 are, on their face, cognizable on federal habeas,
 11 and recommended denying the Motion to Dismiss with respect to those claims. (R&R
 12 at 5-8.) Respondent has filed Objections to the R&R, objecting to the findings that
 13 Claims 4-6 present federal claims. (ECF No. 13.) Petitioner has not filed Objections to
 14 the R&R and has not filed a Reply to Respondent’s objections, although he was granted
 15 leave to do so. (R&R at 8.)

16 The Court has reviewed the R&R and the Objections thereto pursuant to 28 U.S.C.
 17 § 636(b)(1), which provides that: “A judge of the court shall make a de novo
 18 determination of those portions of the report or specified proposed findings or
 19 recommendations to which objection is made. A judge of the court may accept, reject,
 20 or modify, in whole or in part, the findings or recommendations made by the magistrate
 21 judge.” 28 U.S.C. § 636(b)(1).

22 The Court adopts in full the Magistrate Judge’s findings and conclusions with
 23 respect to Claims 1-3, to which no party has objected. The R&R correctly noted that
 24 Claims 1-3 challenge a conviction for which Petitioner was acquitted and for which he
 25 is not currently serving a sentence. (ECF No. 9-14 at 4-5.) Accordingly, those claims
 26 do not allege “that he is in custody in violation of the Constitution or laws or treaties of
 27 the United States,” as required to state a cognizable claim on federal habeas. 28 U.S.C.
 28 § 2254(a); see e.g. Renteria v. Adams, 526 Fed.Appx. 724, 725 (9th Cir. 2013) (holding

1 that federal habeas claim alleging petitioner was prosecuted in violation of double
 2 jeopardy was mooted by his acquittal at trial).

3 With respect to Claims 4-6, the Magistrate Judge found they allege federal
 4 constitutional violations, and dismissal is not appropriate prior to the filing of an Answer
 5 because it does not plainly appear from the face of the Petition that Petitioner is not
 6 entitled to relief with respect to these claims. (R&R at 5-8, citing Rule 4, Rules foll. 28
 7 U.S.C. § 2254 (“If it plainly appears from the petition and any attached exhibits that the
 8 petitioner is not entitled to relief in the district court, the judge must dismiss the petition
 9 and direct the clerk to notify the petitioner.”).) Respondent objects, arguing that Claim
 10 4 does not present a federal claim, and even if it did it is without merit, that Claim 5 does
 11 not state a federal claim because there are no errors to accumulate, and that Claim 6 does
 12 not state a federal claim because there is no constitutional right to discovery, and because
 13 the state appellate court viewed the victim’s immigration file in camera, refuting
 14 Petitioner’s claim that he could not have a meaningful appellate review without access
 15 to those materials. (Obj. at 2-6.)

16 Respondent contends Claim 4 merely challenges Petitioner’s sentence, and,
 17 although admitting that clearly established federal law provides that a state sentencing
 18 error can rise to the level of a federal due process violation, argues that Petitioner has
 19 failed to assert a violation of his federal constitutional rights arising from the alleged
 20 sentencing error, and even if he had, there is no such error here. (ECF No. 9-1 at 5-6.)
 21 The Court agrees with the Magistrate Judge that Respondent’s argument is appropriately
 22 considered after the Petition has been answered. The same is true with respect to Claim
 23 5, alleging cumulative error, which Respondent acknowledges can rise to the level of a
 24 federal due process violation if there are errors to accumulate, but argues there are no
 25 errors here. (Id. at 7-9.)

26 Finally, Respondent argues that Claim 6 does not state a federal claim because
 27 Petitioner does not have a right to discovery, and since the documents sought are not in
 28 the custody or control of Respondent, he cannot assert a violation of Brady v. Maryland,

1 373 U.S. 83 (1963). (ECF No. 9-1 at 6-7.) This claim was presented to the state
 2 supreme court by Petitioner in a pro se petition for review following the appellate court
 3 decision. (ECF Nos. 9-11.) Petitioner asked the state supreme court to review the
 4 materials and, if they determined they should have been disclosed to the defense at trial,
 5 order them disclosed to the defense so a new trial motion could be filed, or, if the
 6 materials are no longer available, reverse the conviction on the basis that his right to
 7 meaningful appellate review as protected by the Sixth Amendment to the United States
 8 constitution was violated. (Id. at 50-52.) Petitioner claims that the victim was less than
 9 candid in her testimony against him, and may have had a reason to embellish her
 10 allegations, because she was an otherwise excludeable alien who could obtain a crime-
 11 victim visa, and without her immigration file the defense may not have been able to
 12 effectively cross-examine her. (Id.) Petitioner presented the claim to this Court by
 13 attaching to his Petition a photocopy of that portion of his pro se petition for review filed
 14 in the state supreme court. (Compare id. with ECF No. 1 at 41-43.)

15 The Court adopts the Magistrate Judge's findings and conclusions with respect to
 16 Claim 6 and overrules Respondent's objections. This claim was presented to the state
 17 court, and is presented to this Court, as alleging a violation of the United States
 18 Constitution arising from the failure of the state courts to release to the defense the
 19 sealed in camera materials. The Court is required to liberally construe the Petition when
 20 determining whether a pro se petitioner has stated a cognizable claim for relief. Haines
 21 v. Kerner, 404 U.S. 519, 520 (1972). The Court agrees with the Magistrate Judge that
 22 Respondent's argument regarding whether Petitioner has demonstrated a federal due
 23 process violation arising from the lack of access to the victim's immigration file is
 24 appropriately considered after the Petition has been answered.

25 **CONCLUSION AND ORDER**

26 For the reasons set forth above, the Court **ADOPTS** the findings and conclusions
 27 of the Magistrate Judge, **OVERRULES** Respondent's Objections, **GRANTS** in part and
 28 **DENIES** in part Respondent's Motion to Dismiss the Petition for a writ of habeas

1 corpus, **DISMISSES** Claims 1-3 from the Petition, and **DIRECTS** Respondent to
2 Answer Claims 4-6 in the Petition.

3 Respondent shall file an Answer within forty-five (45) days of the date of this
4 Order. Petitioner may file a Traverse within thirty (30) days of being served with the
5 Answer.

6 **IT IS SO ORDERED.**

7 DATED: March 14, 2017



8 **BARRY TED MOSKOWITZ**
9 United States District Judge

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